IN THE SUPREME COURT OF THE UNITED STATES.

W. H. Spencer, Trustee in Bankruptcy of the estate of James V. Bennett and Samuel W. Rothrock, copartners, trading as Bennett & Rothrock, Plaintiffs in Error,

vs.

Duplan Silk Company, a corporation organized under the laws of the State of New York, and a citizen thereof, Defendant in Error.

October Term, 1903.

No. 83

BRIEF OF DEFENDANT IN ERROR.

As stated in the opinions both of the Circuit Court and the Circuit Court of Appeals, there is no substantial dispute as to the facts in this case. They are succinctly set forth by Gray, J., in the opinion of the Circuit Court of Appeals, as follows:—

> "Bennett & Rothrock were builders, and as such entered into a written contract with the Duplan Silk Company, bearing date August 30th, 1899, to erect a silk mill for the defendant at Hazleton, Pa., providing all materials and performing the work mentioned in the specifications and shown in the drawings prepared by the architect. By this contract it was provided that the sum to be paid by the owner to the contractor for said work and materials should be $76,000, payable in installments as the work progressed to certain specified stages, the first installment being $5000, and the remaining ones $10,000

each. On the same day, a supplemental contract, according to the form of contract recommended for general use by the American Institute of Architects, was executed between the parties.

"About December 15th, 1899, when the excavations and foundation walls and piers had been completed, and the brick wall partly built, work on the building was lagging. Although, according to the terms of the contract, only the first installment of $5000 had become due, and it had been paid, Rothrock, one of the contractors, came to Emory J. Lipps, general manager of the Duplan Silk Company, and through whom, as its agent, the building contract was made, and asked whether certain moneys could not be advanced beyond what the contract called for. Lipps told him that, personally, he could not advance any money, but that if he presented his case to the board of directors of the Duplan Silk Company, they might be willing to do so. Accordingly, on December 16th, there was a meeting in New York City between Rothrock and those representing the company, at which Rothrock stated that he was very short of money, and that unless he could get some from the company in advance, he could not pay for the material he had ordered, and the men would put him into bankruptcy. They had already made him a payment of $5000, and no other installment was then due. The testimony of Lipps as to the transaction between the parties proceeds as follows:—

" 'We had a meeting in New York City, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000, he would at once go to work and complete the building. Of course he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we

consequently gave him the $15,000. That was on December 16th.

"'Q. So the amount you had paid to the 15th of December was $20,000, although he was entitled to but $5000?

"'A. Yes, sir; he was entitled to $5000 when the excavations were done, and $10,000 when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5000, and we advanced him $15,000 more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground.'

"After this money was advanced, work was continued for a short time, and by Christmas, or a day or two thereafter, it was practically abandoned. On the 13th of January, 1900, Bennett & Rothrock, on their own petition, were adjudicated bankrupts, and W. H. Spencer, defendant in error, was duly appointed and qualified as trustee of their estate. The chattels in controversy were scheduled among their assets, and there were numerous judgments against them, and executions issued thereon, when the petition was filed and the adjudication made.

"On January 11th, 1900, certain letters from the Duplan Silk Company were sent to and received by Bennett & Rothrock, and, as they appear in the record, are as follows:—

"'South Bethlehem, January 11, 1900.

"'*Messrs. Bennett & Rothrock, Williamsport, Pa.*

"'Gentlemen:—We hereby notify you that on account of your failure or inability to prosecute the work on our silk mill building at Hazleton, Pa., according to our contract, dated August 30, 1899, we hereby terminate the said contract, and we will enter and take possession of above named premises on

Monday, January 15th, 1900, for the purpose of completing the work comprehended under said contract in accordance with provisions made therein.

"'Yours truly,

"'DUPLAN SILK COMPANY,

"'E. J. LIPPS,
"'*General Manager.*'

"'SOUTH BETHLEHEM, January 11, 1900.

"'*Duplan Silk Company, New York City, N. Y.*

"'I, the undersigned, acting as overseer and contractor for the architects of the Duplan Silk Company building, in course of construction at Hazelton, Pennsylvania, do hereby certify that the contractors, Bennett & Rothrock, of Williamsport, Pa., through their failure since January 8, 1900, to prosecute the work on said buildings in accordance with their contract with said Duplan Silk Company, under date of August 30, 1899, have given just cause for the owners to terminate said contract as provided for therein.

"'E. J. LIPPS.'

"'SOUTH BETHLEHEM, January 11, 1900.

"'*Messrs. Bennett & Rothrock, Williamsport, Pa.*

"'DEAR SIRS:—Enclosed we send you a notification forwarded to us by Mr. E. J. Lipps, who acts as contractor and overseer for the architects in the construction of the mill at Hazelton.

"'Yours truly,

"'DUPLAN SILK COMPANY.'

"It is admitted by counsel for plaintiff in error that these letters were intended to be pursuant to the fifth article of the supplemental contract, which provides as follows:—

"'ART. 5. Should the contractor at any time re-

fuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties.'

"On January 15th the plaintiff in error took exclusive possession of the building materials and tools, which constitute the property in controversy in this action, and which had been brought upon the prem-

ises by Bennett & Rothrock for the purpose of being incorporated in the mill, for the building of which they were contractors. The plaintiff in error then proceeded to use the materials in the erection of the building, upon which Bennett & Rothrock had defaulted. Thereafter, Spencer, defendant in error, as the trustee of the bankrupt estate, demanded from the plaintiff in error these materials. The demand was refused; whereupon this action of trover for the recovery of the same was commenced by the said trustee."

The legal conclusions drawn from these facts by the learned judge before whom this case was tried are fully set forth, with his reasons therefor, in his opinion refusing the motion of the defendant in error for judgment *non obstante veredicto*. (Transcript of Record, pages 36 to 41.) The error underlying his judgment, as clearly pointed out in the opinion of the Circuit Court of Appeals (Transcript of Record, pages 45 to 53), consisted of an assumption that at the date when Bennett & Rothrock abandoned work under their contract with the defendant, the property in these chattels was without qualification in Bennett & Rothrock, and starting with this erroneous assumption, the case of the defendant in error was treated as resting upon its ability to enforce a forfeiture of the contractors' property.

See Transcript of Record, page 39, where, referring to the certificates in evidence as the basis of defendant's title, the trial judge said:—

> "It is doubtful whether such a certificate is sufficient to sustain a forfeiture of the contractors' property, and the decision of the case might perhaps be put upon this ground."

His opinion then proceeded to discuss critically the fifth article of the contract and to suggest that the silk company might, under this clause, do either one or two things. It might enter upon the premises and use the ma-

terial there to be found for the purpose of completing the work, or it might enter upon the premises and provide its own material for the same purpose; and then construed the notice given as only evidencing an intent to enter and take possession of the premises without taking possession of the material, resting this limited construction of the notice upon the ground that the notice must be strictly construed "as the purpose was to enforce a forfeiture."

In reversing the judgment entered in accordance with this opinion in the Circuit Court, the Circuit Court of Appeals, speaking through Gray, J., said:—

> "The learned judge of the court below regarded the notices given by the owner to the contractor on the 11th of January, and the subsequent taking of possession, on the 15th of January, of the materials brought on the premises by the contractor for the purposes of the building as proceedings to enforce a forfeiture under article 5 of the supplemental contract, and as such to be strictly construed. Taking this view of the character of the provisions of said article 5, he decided that there had not been such a strict compliance by the owner with the requirements of said article 5 as to entitle it to claim a forfeiture, and that the unqualified and absolute property in the materials in question passed to the trustee of the bankrupt contractor on the date of the adjudication of the bankruptcy. It was on this view, principally, that the judgment was entered which was equivalent to peremptory instructions to the jury to find for the plaintiff. On the undisputed facts, however, of this case, we think there was fundamental error in the position thus taken by the court below.
>
> "We do not think that the notices given by the owner, on the 11th of January, and the certificate of the architects on the same day, or the taking exclusive possession of the materials on the ground, on the 15th of the same month, are to be regarded as

steps to enforce a forfeiture, nor that the right reserved to the owner under article 5 of the supplemental contract is to be held as a stipulation to that effect.

"The contract between the parties, contained in said article 5, is to be construed by its plain terms. So construed, it provides a particular mode by which the owner of the premises may enforce the general security, evidently intended to be given him, by the materials brought on to the ground by the contractor, and appropriated by him for the purposes of the building under contract. In this we discover no features of a technical forfeiture. The strictness with which it is sometimes said that a contract involving forfeiture must be construed is not applicable here. The stipulation is to be neither strictly nor loosely construed, but must be dealt with so as to fairly effect the meaning of the parties, as expressed by the language they have used in their contract. There is in the provision that the owner may, in case of default by the contractor, proceed to finish the building himself, and to that end use materials brought by the contractor on the ground for the purposes of the building, no suggestion of loss of property to the contractor, by way of punishment or penalty. On the contrary, the stipulation carried out under the circumstances described would tend to minimize the loss that would otherwise accrue to the contractor from his own default.

"Looking, then, at article 5 to discover the intention of the parties as to this stipulation, we think it is clearly apparent to have been that the materials brought by the contractor upon the premises and appropriated to the building contracted for, should be considered as so far delivered into the possession of the owner as to make them a security for the advances made by the owner. A *quasi* or qualified right of property in these materials by the owner of the soil, and a possession not inconsistent with the

builder's right and duty to incorporate them in the building, would thus result from their delivery by the contractor on the premises and their appropriation to the construction of the building.

"In this view of the case, we are not here concerned with the question whether the plaintiff in error precisely complied with all the requirements of article 5 in taking steps to make effectual the security furnished by the materials brought by the contractor on the ground. The general contract as to this matter must be taken to mean something, and it would be of little avail to say that the plaintiff in error can take the steps prescribed in article 5 to make this security available, if the materials themselves could be taken away, as claimed by defendant in error, by the execution of a creditor or the action of a trustee in bankruptcy. The effect of the whole contract between the parties, including article 5 of the supplemental contract, in whatever terms it may be described, was to affix to the materials brought upon the ground and appropriated to the building by the contractor, a charge or interest in favor of the plaintiff in error, consistent with the qualified ownership of the defendant in error, but commensurate with the requirement that they should furnish security to the plaintiff in error for the performance of the contract and for advances made.

"The special oral agreement of December 16th, 1899, as set forth in the testimony of Mr. Lipps, general manager for the plaintiff in error, which is not contradicted or disputed, may be taken as a specific appropriation of the materials at that time delivered on the premises of plaintiff in error as security for the advances then made, freed from the requirements of notice and certification by the architect, contained in the fifth article of the supplemental agreement; and as making effective and available at once the inchoate lien or title of the plaintiff in error to said materials. In other words, by this oral

agreement, the qualified possession of these materials by plaintiff in error, was made immediate and unqualified. The security originally intended by the parties was perfected as to the advances then made.

"Nor in this view of the mutual rights of the parties given, can it be contended that this oral agreement of December 16th, 1899, was an unlawful preference, in fraud of the bankrupt law. It was not a new and independent contract, but a recognition of the old contract, and in furtherance and consummation of its intent. A mortgagor, who puts his mortgagee in the actual and unqualified possession of the chattels mortgaged, instead of compelling him to take the formal steps for a foreclosure, is acting in furtherance of the original contract, not making a new one, in the sense that would, in this case, transgress the inhibition of the bankrupt law as to preferential conveyances.

"Unquestionably, the defendant in error could not have been held to challenge the legal and binding effect of this contract, as above described; but their counsel now contend that, even though it be good between the parties, their immediate representatives and volunteers, this contract cannot bind third parties without notice, and that *bona fide* judgment creditors could have levied upon and sequestered the materials herein in question, unaffected by the contract, even though admitted to be binding between the parties. And if creditors could have so attached the property, free from any claim on the part of the plaintiff in error, then it is argued that, under the provision of section 70 of the bankrupt law, which gives to the trustee any property which might have been levied upon and sold in judicial process against the bankrupt, the unqualified property in these materials vested in the trustee. The Statute of Elizabeth, as in force in Pennsylvania, is invoked to declare illegal against creditors a conveyance, pledge, or charge of property, unless accompanied by delivery or

change of possession, and the court below, taking this view, relies upon section 67, clause (*a*) of the bankrupt law, which provides that 'claims which, for want of record, or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate.'

"In order to arrive at this result, it is assumed that the property in question could have been levied upon and sold under judicial process against the bankrupt, either generally or because there was no possession in the plaintiff in error, that would make good its claim against creditors of the bankrupt. But this assumption is not warranted. The goods delivered by the contractors upon the premises, for the purpose of being built into the structure contracted for, were sufficiently in the possession of the owner of the premises to protect the lien, claimed as the result of the understanding between the parties of the contract. They were in the possession of the owner of the freehold as fully as they could be, consistently with the right of the contractor to incorporate them in the building. In this respect, this case differs from those cited by defendant in error, in which the materials furnished by the contractor, and in litigation between the parties, were in the exclusive possession of the contractor, never having been delivered upon the premises of the owner. Materials delivered, as in this case, are notoriously to all the world in the qualified possession and ownership of the owner of the freehold, and the creation of a lien or charge, or the making of a conveyance, would not require, or indeed be susceptible of, any further delivery or change of possession, in order to take the case out of the mischiefs of the Statute of Frauds.

"To merely say that these materials could have been levied on by judgment creditors of the bankrupt, and thus bring them within the description con-

tained in section 70 of the bankrupt law, of property that, upon the adjudication of bankruptcy, passed to the the trustee of the bankrupt, is begging the question. These materials would not, in our opinion, after their delivery on the premises by the contractor, have been liable to such a seizure, for the reasons that we have already stated.

"The situation of the parties, as the result of the contract between them, was such that the contractor could have made no disposition of this property inconsistent with his obligations under the contract, and he could have been prevented in equity, by injunction, from so doing; and equally so could a creditor have been prevented from asserting a right of seizure inconsistent with the interest of the plaintiff in error. In this respect, we think the case is quite within the *ratio decidendi* of Hauselt *vs.* Harrison, 105 U. S., 401, 407. The trustee in bankruptcy, seeking by proceeding in law to enforce the title of the bankrupt to personal property so situated, will be subject to all legal and equitable claims of others which exist against the bankrupt not in fraud of the bankrupt law or the rights of general creditors.

Hauselt *vs.* Harrison (*supra*);
Cook *vs.* Tullis 18 Wall., 341;
Yeatman *vs.* Sav. Inst., 95 U. S., 739;
Stewart *vs.* Platt, 101 U. S., 739;
South Branch Lumber Co. *vs.* Ott, 142 U. S., 622;
Chattanooga Nat. Bk. *vs.* Rome Iron Co., 102 F. R., 755.

"The law of the contract as we view it, supports the claim of the plaintiff in error that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an

advance of $15,000 upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor to enforce the original contractual right and to apply the materials to the use to which they had been specifically appropriated by the contractor in delivering them on to the premises of the owner for use in fulfilling the contract.

We disagree, also, with the position taken by the learned judge of the court below in regard to the effect of the oral agreement of December 16th, when he says: 'Even assuming, however, that the contract or pledge was actually made it would be ineffective, because no possession was ever taken by the silk company under the contract, and therefore, if under such circumstances any lien could be said to exist, it would be a secret lien, and like the privileges reserved under the fifth article, would also be stricken down by the Pennsylvania law in favor of other creditors.'

"What we have already said as to the effect of the delivery by the contractor of the materials upon the premises of the silk company, in giving it a possession that would protect the lien which we think was intended to be created by the parties in their general contract, and especially in the fifth article of the supplemental agreement, is applicable to the proposition of the learned judge just quoted. There is no intimation in the testimony that if this oral agreement was a distinct and independent pledge it was not, to use the language of section 67 (*d*) of the Bankrupt Act 'given or accepted in good faith, and in contemplation of or fraud upon this Act and for a present consideration.' The only question, then, is the one upon which the court below expressed itself in the opinion just quoted, to wit, that there was not sufficient delivery or change of possession to deprive the transaction of the character of a secret lien, as denounced by the law of Pennsyl-

vania in that behalf, in favor of attaching creditors, and therefore of the trustee in bankruptcy. The intention to pledge being clear and the consideration being substantial and adequate, what other Act was necessary to give the requisite possession to avoid the mischiefs aimed at by the law of Pennsylvania as founded on the statute of Elizabeth? The materials were already on the land and premises of the company for the purpose of being incorporated into the building. Could that possession, in pursuance of the pledge, be made more notorious and open by moving them away and bringing them back or by removing them to other land of the silk company? We think not. Goods pledged or conveyed, while so situated, are within none of the mischiefs of the Statute of Frauds, and can be the occasion of no deception to a creditor of the contractor, any more than if fully incorporated into the building, in which case no assertion of a right in a creditor to attach is suggested.

"On the whole case, therefore, we think the learned judge of the court below erred in not granting defendant's motion for judgment, notwithstanding the verdict. The judgment below is therefore reversed wth directions to enter one in favor of the defendant."

A consideration of the character of the contract between the Duplan Silk Company and the firm of Bennett & Rothrock will demonstrate the correctness of the views of the Circuit Court of Appeals and the fundamental error of the position taken by the present plaintiff in error.

The law relating to the transfer of title where the contract is a mere contract of sale is stated with great felicity in Hare on Contracts, page 397:—

"Agreeably to the Roman law a contract of sale did not pass the right of property until the goods were delivered to the purchaser or subject to his

dominion and control. It results from this doctrine, as logically applied in Scotland, that merchandise which has been not only sold but paid for may be taken in execution by the vendor's creditors down to the last moment before delivery, and the purchaser left to seek redress in an action to recover back the price, which in the case of an insolvent vendor will generally prove illusory. The common-law rule is the direct opposite—that where the price is fixed and the subject matter ascertained with an intent to pass the right of property, the law will carry the purpose into effect although the purchase money has not been paid or the goods delivered. And as this rule meets the requirements of business life, it has been adopted not only in England and the United States, but in countries which, like France and Holland, follow the principles of the civil law. Agreeably to the Code Napoleon the sale is complete between the parties, and the property is acquired in law by the purchaser with regard to the seller, as soon as the thing and the price are agreed on, though the thing has not been delivered or payment made."

Where the contract is not a simple contract for the sale of a chattel in *esse*, but for the making or constructing of an article to be finished by one contracting party, the question of when title passes is to be determined by the court in accordance with the intention of the contracting parties.

This subject received full consideration in the case of "The Poconoket," 70 Fed. Rep., 640, in which the very learned opinion of Judge Butler, 67 Fed. Rep., 262, was affirmed in the Circuit Court of Appeals. In that case it was held that the mere fact that in a contract for the sale of a vessel payments were to be made by installments, as the work progressed, did not evidence an intent to vest a title in the purchaser, but that the court in each case were required to look at all the terms of the contract and discover the real intent of the parties, and

that if, upon the face of the writing, no intent was evidenced, it was competent to show by parole that a verbal agreement had been made before the execution of the contract that the title should pass when the work was commenced. In this case there is a full review of all the authorities.

In the present case, while it might be admitted that the mere provision for payment on account of the purchase price by installments, as the work progressed, did not evidence any conclusive intent to pass the title as against the contractors, but only to relieve the contractors from the obligation to completely finish the work provided for by the contract as an entirety before receiving a portion of the price, the eleventh article does clearly indicate an intent to give the owner an interest not only in the partially completed structure, but also in all materials in or about the premises:—

> "ART. XI. The owner shall, during the progress of the work, maintain full insurance on said work, in his own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building and all materials for the same in or about the premises, and shall be made payable to the parties thereto, as their interest may appear. The premium on said insurance to be paid one-half by the owner, the other half by the Contractors."

While the provision for the payment of the premium on this insurance is arbitrarily fixed at one-half thereof to each, the loss under the policy, if any, is made payable to either party as their interest may appear.

In the present case, following the ruling *in re* "Poconoket," that parole evidence is admissible to show an agreement supplementing the contract, upon this subject, it is proper to call attention once more to the testimony of E. J. Lipps (Transcript of Record, pages 28 and 29), where it appears that Rothrock, one of the contractors, obtained payments in advance of the time prescribed by

the written contract, upon statements which were accepted and acted upon by the defendant corporation, and which clearly evidenced an intent to vest in the defendant corporation a title in the materials upon the ground at least sufficient to protect them in their advances.

"Accordingly we had agreed upon a meeting in New York. Mr. Rothrock was present, and he presented his case saying that he was very short of money, and unless he could get some money from us in advance he could not pay for the material he had ordered, and the men would put him into bankruptcy. We should therefore advance him money beyond what the contract called for.

* * * * * * *

"We had a meeting in New York City, and upon the promise of Mr. Rothrock that he would at once put more men at work and continue the work, if we advanced him $15,000, he would at once go to work and complete the building. Of course, he could not complete it in the time that was specified, but he claimed that he had so much material on the ground that we were fully covered by advancing him that money. We knew that material was there, and we consequently gave him the $15,000. That was on December 16th.

* * * * * * *

"Q. So the amount you had paid to the 15th of December was $20,000, although he was entitled to but $5000?

"A. Yes, sir; he was entitled to $5000 when the excavations were done, and $10,000 when the brick walls were complete. The brick wall is only a very small part of the building, because the building is a one-story building. The valuable part is the interior work. We had advanced him $5000, and we advanced him $15,000 more. He argued that we would be perfectly safe in doing so, as he had the materials on the ground."

* * * * * * *

This special and new arrangement for the advance of $15,000 prior to the time when it was payable under the contract, and the securing the same by a lien upon the materials delivered, in nowise contradicted the written contract, indeed, it was but the development of the inchoate right of the owner conferred in article 5 of the written contract, which has already been quoted in full. By that clause the owner, as part of the original contract, obtained the right, in case of the default of the contractor, to use the materials placed on the ground by the contractor for the fulfillment of the contract.

This right was not in the nature of the forfeiture of any property right of the contractor, but really in aid of the contractor, because thereby the claim for damages which the owner would have against the contractor would be reduced. It was an intelligent and business-like arrangement to reduce damages to the contractor in case of his failure, and in nowise a forfeiture. If the contract had provided that the goods might be taken as forfeited, with the privilege to the owner to sue for damages suffered in consequence of the default, without making any allowance for the materials thus taken, the court could properly regard it as a forfeiture, but in the form in which the contract gave the right to the owner, the parties provided the best method of reducing the damage consequent upon the failure of the contractor. The clause therefore is one which should be enforced in aid of its reasonable intent, and any judgment which is based upon the thought that it should be strictly construed as a clause involving a forfeiture, is based upon a fundamental error.

The defendant in error therefore claims that the right of the owner was a specific contractual right conferred upon it by the original agreement between the parties, and that the subsequent action of the owner in acceding to the request of the contractor for an advance of $15,000 upon the faith of the materials delivered upon the ground, confirmed and made certain the right of the owner upon the subsequent default of the contractor to enforce the original contractual right and to apply the materials to

the use to which they had been specifically appropriated by the contractor in delivering them on to the premises of the owner for use in fulfilling the contract.

This case is much stronger for the owner than was the title of the defendants in the case of Hauselt *vs.* Harrison, 105 U. S., 401. That was an action of replevin by Harrison, assignee in bankruptcy of Bayer, against Hauselt and Korn, to recover possession of certain tanned skins, part finished and part unfinished, and bark. In that case, on May 29th, 1874, Bayer and Hauselt entered into an agreement under which Hauselt advanced to Bayer moneys for the purchase of skins to be tanned and finished by Korn, Bayer agreeing upon the finishing of the tanning to send the skins to Hauselt for sale upon commission; the agreement further provided that the skins purchased under the agreement, whether green or in process of tanning, should be construed as security for the moneys advanced. The business continued until November 6th, 1874, when a further agreement was executed, reciting that Bayer was ill and unable to complete the tanning of the skins then on hand in tannery, and authorized Hauselt to take possession of the same. Hauselt took possession of the tannery and four days after, on November 10th, Bayer filed a petition in bankruptcy, whereupon his assignee brought replevin for the skins. The court charged the jury in substance as follows:—

> "That the property in the skins purchased by means of the advances under the contract of May 29th, 1874, was in Bayer; that Hauselt had no right to the possession of them at any time while they were in the process of manufacture; that the only security given by the contract was the personal obligation of Bayer to consign them to Hauselt for sale, when the manufacture was complete; that the contract of November 6th, 1874, and the possession delivered and taken in pursuance of it, was a transfer to which Hauselt was not entitled, and constituted a preference within the meaning of the bankrupt

law; that if it was made to make and obtain payment of the whole of the debt to Hauselt, Bayer being in fact insolvent, and Hauselt having reasonable cause to believe him to be so, the transaction was fraudulent and void, and the verdict should be for the plaintiff."

There was a verdict in favor of the assignee. Upon writ of error this judgment was reversed. The opinion of this court, by Mr. Justice Matthews, contains the following:—

"Notwithstanding the difference between the contract of May 29th, 1874, between Bayer and Hauselt, and the contract considered by this court in the case of the Powder Co. *vs.* Burkhardt, 97 U. S., 110 it must be conceded that the legal title to the skins purchased with the money advanced by Hauselt vested in Bayer. But it was not an unqualified property. We cannot agree with the Circuit Court in the construction that the only security given to Hauselt by the contract was the personal promise of Bayer that he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligations to deliver the skins when tanned would still remain. The clause providing for security must be held to mean something, and it declares that the skins themselves, before delivery of possession to Hauselt under the contract, for purposes of sale shall be considered as security.

"The legal effect of such a contract, it was decided in Gregory *vs.* Morris, 96 U. S., 619, was to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely.

"Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt, and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee, fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits of the agreement."

This quotation is instructive. Can it be doubted, that as between these parties, the contractors and this defendant in error as the owner of the property, a court of equity, upon the application of the owner, would have enjoined the contractors from removing from the premises of the owner the materials placed thereon under the terms of the contract, and upon the faith of which the owners had made an advance payment, had the contractors undertaken themselves, after having received such advances, in disregard of the rights of the owner, to have removed these materials? That the trustee in bankruptcy who seeks, in a proceeding at law, to enforce the title of the bankrupt will be subject to all the limitations which exist as against his assignor is shown, by a further quotation from the same opinion:—

"If, in consequence of his bankruptcy, the property had come into the possession of his assignees, they would have taken it subject to all legal and equitable claims of others not in fraud of the rights of general creditors. They would be affected by all the equities which could be urged against him. Cook *vs.* Tullis, 18 Wall., 341. In Yeatman *vs.* Savings Inst., 95 U. S., 764, it was held to be an established

rule that, 'except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of the law or by act of the bankrupt, which existed against the property in the hand of the bankrupt.' 'He takes the property in the same plight and condition that the bankrupt held it.' Winsor *vs.* McLellan, 2 Story, 492. In Stewart *vs.* Platt, 101 U. S., 739, it was held that, although the chattel mortgages, involved in that litigation, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the parties. Mr. Justice Harlan, delivering the opinion of the court, said: 'The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. The latter (the assignee), representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee.'

"It follows that Bayer becoming a bankrupt while in possession of the skins purchased and in the tannery, under the contract of May 20th, 1874, if his assignee in bankruptcy had taken possession of them, he would have done so subject to the terms of that contract, and Hauselt would have had the right to require, either that he should perform the contract to its termination, so far as the skins then on hand were concerned, by finishing them and forwarding them

for sale, or that he should surrender possession to Hauselt, under some arrangement, mutually beneficial, whereby the enterprise might be wound up, under his management, such as that actually made by Bayer on November 6th, 1874, or if the assignee sold the property in the condition in which he received it, that he should account to Hauselt specifically for the proceeds of the sale, and recognize him as a creditor for the remainder of his advances not thereby refunded.

"Such being the mutual rights of the parties, the transaction of November 6th, 1874, though made with knowledge of Bayer's insolvency, and in contemplation of his bankruptcy, if made in good faith, as it is admitted to have been, for the purpose of securing to Hauselt the benefits of the contract of May 29th, 1874, was legitimate, and did not constitute, as was held by the Circuit Court, an unlawful preference in fraud of the bankrupt law."

We rely upon this opinion of this court as conclusive of the principles which determine the rights of the parties to this litigation.

That the principles thus expressed are not obsolete we would refer to their reaffirmation in South Branch Lumber Company *vs.* Ott, 142 U. S., 622.

In that case the insolvency law of the State of Iowa gave rise to the controversy, but the court sustained, as against the assignee for the benefit of creditors, the act of the insolvent debtor whereby a creditor was made secure in the enjoyment of property pursuant to an antecedent executory agreement.

Mr. Justice Brewer said:—

"In reference to the letter from Ott to White, with respect to holding the four carloads of glass as security for freights, it is clear that this was only putting in writing an agreement made long before. For the testimony of White and Ott both show, and to their testimony there is no contradiction, that White,

months before, had again and again urged prompt payment of freights, and that Ott had agreed to always leave on the track goods enough to secure any amount of freight that might be due. The prior agreement, though oral, was valid; and the letter was not a new contract, giving them a preference, but only a written expression of that which had heretofore been agreed upon, and agreed upon when there was no thought of an assignment. This brings the transaction within the reasoning of this court in the case of Hauselt *vs.* Harrison, 105 U. S., 401, in which, as against the claims of an assignee in bankruptcy, a transfer made immediately before the adjudication in bankruptcy was held to relate back and to carry into effect an agreement entered into long before, and therefore, not to be vitiated by the bankruptcy proceedings."

We would also refer to the learned opinion of Mr. Justice White in Walker *vs.* Brown, 165 U. S., 654, as showing the extent to which this court gives effect to executory agreements relating to chattels. In that case, successive decrees of a Circuit Court and a Circuit Court of Appeals were reversed, and an equitable lien was held to exist against certain bonds by virtue of a letter from the owner of the bonds to a creditor, stating that the bonds had been loaned to a debtor with the understanding that any indebtedess owing to the creditor at any time should be paid before the return of the bonds or their value to the owner, and that they or their value were at the risk of the debtor's business so far as any claim the creditor might have against the debtor was concerned.

The fact that the plaintiff in error is the trustee in bankruptcy of Bennett & Rothrock cannot enable him to strike down the rights of the defendant in error over the chattels in dispute secured to the defendant in error by the plainest kind of a contract.

In Cook *vs.* Tullis, 18 Wall., 341, a trustee in bank-

ruptcy sought to set aside the transfer of certain securities from the bankrupt to the defendant. It appeared that the bankrupt had been engaged in the business of banking and had received from the defendant bonds for safekeeping. The bankrupt, without the permission of the defendant, took and used certain of the bonds that had been left with him for safekeeping, substituting in their place the securities in suit. Shortly after the failure of the bankrupt, the defendant was informed of this substitution of securities and thereupon signified his acceptance of the same and his satisfaction with the transaction. It was held that the trustee in bankruptcy had no right to the securities given to the defendant in lieu of those which the bankrupt had used without authority.

In Yeatman *vs.* Savings Institution, 95 U. S., 764, the pledge of property in the due course of business and for a valuable consideration was held as against the trustee in bankruptcy of the pledgor, to entitle the pledgee to hold the property pledged until his debt had been paid.

In Stewart *vs.* Platt, 101 U. S., 731, certain chattel mortgages executed by a firm of bankrupts had not been properly recorded, and under the laws of New York were invalid as to creditors of subsequent purchasers or mortgagees in good faith. The trustee in bankruptcy, however, was held to have taken the property mortgaged subject to these mortgages for the reason that the mortgages were valid and effective as between the mortgagors and the mortgagee, and the trustee took no higher or better title than the mortgagors.

The three cases last referred to were decided under the Bankruptcy Act of 1867, but the plaintiff in error can derive no advantage from that fact.

By the Act of 1867, section 5046, is defined what property vested in the assignee:—

> "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copyrights; all debts due him, or

> any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together wth the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

This is fully as broad as the provision of section 70 of the Act of 1898, as to "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied or sold under judicial process against him." The attempt to avoid the effect of our argument by suggesting that the Bankruptcy Act of 1898 enables the trustee in bankruptcy to avoid all transfers made in fraud of creditors, misses the whole point of our contention, which is that the transaction, as we consider it, was not in fraud of creditors, but one made in good faith, in which the defendant in error as a purchaser for value in the strict sense claims title to property in its possession, and for which it has paid full value.

In Chattanooga National Bank *vs.* Rome Iron Company 102 Fed. Rep., 755, it was held under the Bankruptcy Act of 1898 that any action taken, whereby immediately prior to bankruptcy a debtor made effective to his creditor a security which had been promised in the original contract, violated no right of the general creditors and the trustee in bankruptcy would not be permitted to assert any higher right than the debtor himself could have asserted if no bankruptcy had supervened.

The form of contract used by the parties in this case upon its face is styled "The Uniform Contract, adopted and recommended for general use by the American Institute of Architects and the National Association of Builders."

The fifth article appears not to have been original on this side of the Atlantic. Similar clauses have been in use in England for many years, and the cases in England under their Bankruptcy Act, in construing the rights of trustee in bankruptcy, fully sustain the position for which we contend.

In re Waugh, 4 Ch. Div., 524 (1876):—

> "A builder contracted with a building club to erect houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner, to the satisfaction of the architect of the club, or should become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract. The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 2d of May he filed a liquidation petition. On the 2d of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they, on the expiration of two days, should employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works; and on the expiration of this notice the club took possession of the materials, implements and plant. It was held that the club was entitled, as against the trustees in

the liquidation, to retain what they had seized, the seizure being a protected transaction within the Bankruptcy Act."

In Hawthorne *vs.* Newcastle-upon-Tyne, &c., R. Co. 3, Q. B., 734:—

"A railway company entered into a contract (dated December 27th, 1836) with certain builders for building a bridge, all necessary implements and materials to be found by the builders with power to the company, if, in the opinion of the architect, the contractors should not proceed with sufficient expedition, to employ other or additional workmen, to complete the works, on giving them seven days' notice, and in such case to use the cranes, machines, implements and materials used on or about the works by the contractors, who were to defray the extra expenses incurred. The contract provided that the company should have a lien upon such machines, implements, and materials as should, for the time being, be in and upon the land, as a security for the completion of the bridge. On the 26th of July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge had been previously deposited by them on it and the land adjoining. These consisted of four kinds: First, Those actually on the land of the railway. Second. Those upon land adjoining the line (not the property of the company, but enclosed and taken possession of by them under the Act.) Third. Those deposited upon the lands of the temporary railway made by the bankrupts, over land not belonging to the company, for the convenience of conveying materials. Fourth. A crane erected by the contractors at the end of the temporary railway. On the 31st of July the company took possession of all these goods. On the 1st of August it gave the seven days' notice that other workmen would be employed and on the second

day they took upon themselves the completion of the bridge, using some of the goods and retaining the remainder. In trover brought by the assignees in bankruptcy for these goods it was held that the company had a lien upon the first and second classes, but not upon the third and fourth, which, nevertheless, at the expiration of the notice, it had a right to retain and use about the work, for the agreement was lawful, not being made in contemplation of bankruptcy, and that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. Iv. Ch. 16, 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's authority, the lien being a shifting one and attaching to such articles as were brought from time to time, and ceasing to such only as were removed; nor by the implements and materials not being scheduled.

Garrett *vs.* Salisbury Railway, Law Reps., 2 Equity, 358, illustrates the proposition which we have already developed, that clauses such as this in a building contract do not necessarily give an absolute ownership in the materials to the owner, but a qualified property right which will be enforced as far as is necessary for the protection of the owner, but on the terms which are equitable to the contractor and really in aid of his estate. The syllabus of the case is as follows:—

"An agreement between a railway company and a contractor provided that in case the contractor should be guilty of any delay or default in the fulfillment of the contract the company might take the execution of the work out of his hand, and might use all or any of his plant, materials, or implements; and that in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his con-

tract towards satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant, and implements, which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company.

"The company took the execution out of the contractor's hands under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbitration.

"*Held*, that the plant and materials did not become the absolute property of the company unless loss or expense had been occasioned to them; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration."

In Blake *vs.* Izard, 16 W. R., 108, a building contract provided that all materials brought on the land by the intended lessee should become the property of the land owners. The intended lessee entered and commenced building, but obtained no lease. It was held that the title to the materials brought on the land by him vested in the land owner and were not liable to be taken in execution by a creditor of the intended lessee.

In Brown *vs.* Bateman, 15 W. R., 350, by agreement between a land owner, A., and builder, B., B. undertook to build some houses on land belonging to A., B. to have the option of taking a lease, A. to make advances as the work progressed, and all bricks brought on premises for erection of houses to "be considered as immediately attached to and belonging to the said premises," no part to be removed without A.'s consent, and on failure of B. to proceed with erection, A. could re-enter and take possession of buildings and materials. The action was a suit

by a creditor of B. against the sheriff for failing to realize out of these materials levied on at the creditor's suit as belonging to B. Bovill, C. J., said, as the builder was in possession of the premises, "there had been no delivery of the materials to the landlord, and therefore the landlord possessed no rights except those mentioned in the agreement." After reading the clauses of the agreement, he said: "I think he had an equitable right when the materials were brought upon the premises; they became attached to and formed a part of the freehold, and therefor in my judgment an equitable interest was created and the materials ceased to be the property of the builder." The other judges agreed that by the contract an equitable interest in A., not coming within the Sales Act, had been created.

In Banbury & Cheltenham Direct Ry. Co. *vs.* Daniel, 33 W. R., 321, the contract between a railway company and a contractor for the construction of a new railway contained a provision that once a month during the construction of the railway the engineer of the company should certify the amount due and payable to contractor according to a scale to be agreed upon between the engineer and contractor, until a certain sum should have been certified, and that then the amounts certified for should be paid by the company within seven days after presentation of the certificates. It was held that the property in unused materials delivered by the contractor for the purpose of construction, which had been comprised in certificates of the engineer, but had not been paid for by the company, passed to the company, and an injunction was granted to restrain the contractor from removing such materials from the land of the company.

In *Ex parte* Newitt, L. R., 16 Ch., D. 522, a building agreement between a land owner and a builder, under which the builder became lessee, contained a stipulation that the land owner, upon the default of the builder, might re-enter and take possession of building, materials, &c., and it was held that the interest of the builder was defeasible, subject to the right of the owner; and that the

assignee in bankruptcy of the builder took subject to that right. In delivering his opinion, James, L. J., said: "The broad general principle is that a trustee in a bankruptcy takes all the bankrupt's property, but takes it subject to all the liabilities which affected it in the bankrupt's hands," and Cotton, L. J., said: "If, as is admitted, the rights of the land owner under the agreement could not have been defeated by a transfer of the chattels for value, so long as they remained on the land, by what provision of the Bankruptcy Act is the land owner placed in a worse position as against the trustee? None has been pointed out to us."

Tripp *vs.* Armitage, 4 Meeson & Welsby's Rep., 686, is sometimes referred to as sustaining a different principle, but it will be found upon an examination of the report that at the trial of the case Lord Abinger instructed the jury in accordance with the principle for which we contend, saying:—

> "If the advances were made to Bennett on the understanding and agreement that the materials brought upon the premises should be considered as a pledge for those advances, they should find a verdict for the defendants."

And the jury so found. Upon argument of a motion for a new trial, in an opinion which does not contravene the abstract proposition, he, upon investigation of the particular facts of that case, deemed it his duty to grant a new trial.

But even though the opinions of Lord Abinger and Baron Parke in the case last cited should be construed as sustaining the rule contended for by the other side, we respectfully submit that it is not in harmony with the line of English cases to which we are referring, and at all events it is not in accordance with the views expressed by this court.

Wood *vs.* Bell, 5 Ellis & Blackburn, 772, is an authority which in every way sustains our contention, and the opin-

ion of Lord Campbell, C. J., is in entire harmony with the ruling in the case of "The Poconoket," above cited. A statement of the syllabus shows everything which was decided:—

"J., a shipbuilder, agreed to build an iron steamship for W., on the same terms as other vessels which he had previously built for him. By reference to these terms it appeared that the price was to be £16,000, payable by installments, the first installment to be £1000, payable immediately. The second, third, and fourth, of £1000 each, to be payable at the end of two, three, and four months, respectively, from the date of the order; the remaining £12,000 to be payable by installments of £3000 each, the first £3000 at the end of six months, provided the vessel was plated and decks laid; the second £3000 at the end of eight months, provided the vessel was ready for trial; the third £3000 at the end of eleven months, provided the vessel was according to contract and perfectly completed; the last installment of £3000 at the end of thirteen months; the vessel to be built under the superintendence of H., appointed for that purpose by W., and according to his specifications.

"The building commenced under the superintendence of H. W. advanced the money to J. in anticipation of the installments. In the tenth month J. became bankrupt. The vessel was at that time unfinished in J.'s yard; the engines and part of the framework of the vessel, adapted for the unfinished ship, but not yet fixed into her framework, were there also. W. claimed the unfinished vessel and these engines and parts of the framework. The assignees of J. kept them as part of the estate of J. The amount paid in advance by W. exceeded the value of this property.

"A case was stated for the opinion of this court, setting forth the above facts, and also that the un-

finished ship was known at J.'s yard as W.'s ship, and that H. had, with J.'s consent, before the bankruptcy, stamped W.'s name on the keel of the vessel, for the express purpose of indicating that she was the property of W. The questions were, whether the property belonged to W. or the assignees; and whether W. could recover special damages for the detention of the ship, beyond its value.

"*Held*, that, whether the property in the unfinished ship was under the contract to vest as it was building, depended upon the intention of the contracting parties; that the provision making the payment of the installments partially dependent upon the progress of the ship was an indication of intention to vest the property as it was building; that the building of the vessel under the control of H., acting for W., was a stronger indication of intention; that these might not be sufficient by themselves; but that J., whilst *sui juris*, having consented to the stamping of the name of W. on the framework as declaring it his, the conclusion, from all the facts together, was that the property did vest. And that property in the loose engines and materials appropriated to the ship followed the ship itself.

"*Held*, also, that W. might recover special damage."

Ex parte Black, L. R., 26 Ch. Div., 510, is a further authority in our favor. If the facts which are stated in some confusion are carefully read, it will be seen that the vessel which was the subject of the contract in that case was under construction in the yard of the builder who became bankrupt. In so far as the owner of the vessel claimed a title in materials which had been specifically set apart for use in the ship, the court held that the owner had the right as against the trustee in bankruptcy.

We know that cases might be cited to sustain the proposition that a contract to build a house is an entire contract, and that until the entire house is constructed

the builder is not entitled to recover any portion of the price, and that if while under construction any portion is destroyed by fire or storm, the loss is the builder's. Such decisions do not contravene the proposition for which we contend. It may be that if a builder is to receive an entire compensation upon the completion of an entire work, no action can be maintained for that price except upon the completion of the entire work. But where the payment is by installments different consequences arise, and, as has already been point out in the "Poconoket" case, the question of when the title passes is to be determined as a fact in each case, depending upon the actual intent of the parties, to be determined by the contracts, both written and verbal.

But cases of the class above mentioned throw no light upon the legal relation of a party under a contract and circumstances such as are shown in this case.

When the application of a supposed principle of law in the construction of the rights of the parties under a contract produces a result which so intelligent a judge as Lord Abinger recognizes as a very hard case, it is not out of place to suggest the possibility that the principle has not so universal application as has been assumed.

It may well be that an abstract statement of principle which is deduced from decisions in suits by contractors to recover the contract price for work not finished according to contract, will cause confusion if used to enable a contractor to retake materials which he has delivered pursuant to contract and for which he has received full payment.

The case of the defendant in error may be summed up in the following propositions:—

1. The trustee in bankruptcy has no higher or better title than his assignors to maintain this action against this defendant in error.

2. As between the contracting parties, the defendant in error for whom the plaintiff's assignors contracted to erect the mill, had by the original contract an inchoate right and qualified title in the materials as soon as they were

placed upon the premises, which gave the defendant in error a *status* to object to any misappropriation of the same to any other use.

3. This inchoate right of the defendant in error was made firm by the subsequent oral agreement between the defendant in error and the contractors whereby, upon the faith of the materials delivered, the defendant in error made an advance of $15,000 in anticipation of the time prescribed by the contract.

4. As the assignors of the plaintiff in error obtained this advance payment in anticipation of the complete doing of the work which would have entitled them to demand payment under the contract, it does not now lie in their mouth, or in the mouth of their trustee, to dispute the title of the defendant in error, which they admit would have been indisputable had the work of completely affixing the materials been performed.

WM. JAY TURNER,
RICHARD C. DALE,
For Defendant in Error.